United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7676

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs-Appellants,

against

EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants-Appellees,

and

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE and MICHAEL ROTH,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

ZIMMER, FISHBACH & HERTAN
Attorneys for Defendant-Appellee
Edith Sideman
919 Third Avenue
New York, N.Y. 10022

---

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs-Appellants,

against

EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants-Appellees,

and

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE and MICHAEL ROTH,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

Preliminary Statement

The plaintiffs' appeal from a judgment of the District Court granting summary judgment to the defendant-appellee, Edith Sideman, and dismissing the complaint as to her and her co-defendants, "John Doe", "Richard Roe"

and "Thomas Hoe". The judgment was entered in accordance with the District Court's finding that there was no just cause for delay, pursuant to Rule 54(b), after it had granted the defendant Sideman's motion for summary judgment and dismissed the complaint as to her (A-51).

The plaintiffs also appeal from an order of the District Court denying their motion for reargument.

The Complaint

The complaint is a melange of irrelevancies, hearsay, and unsupported conclusions of fact and law, and clearly violates the Rules with respect to pleading. It sets forth no tenable or discernible theory of recovery.*

The complaint contains two "causes of action." The first claim, it is alleged, "arises under the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and §§ 1983 and 1985 of Title 42, of the United States Code." Jurisdiction is allegedly conferred on the District Court by 28 U.S.C. § 1343 (A-2). The complaint does not indicate which of the four subdivisions of § 1343 is applicable.

The second cause of action allegedly arises "under Article 1, Sections 1, 6, 7, 8 and 11 of the Constitution of the State of New York, under Section 50 of the General Municipal Law of the State of New York, and under the common law of that state." Jurisdiction is alleged to be pendent (A-12).

The complaint makes no attempt to show how or why the alleged conduct of the defendants, and particularly of the defendent Sideman, constituted a violation of the cited Constitutional provisions or constituted violations of the

---

* (Appellants concede in their Brief (pp. 2, 11) that "the issue of injunctive relief is now moot, since appellants are no longer in business. The action "at the present stage, is one for damages.")

cited Federal civil rights statutes. Its conclusory allegations with respect to malice, causation, conspiracy, and as done for the purpose of depriving the plaintiffs of their Constitutional rights, unsupported by facts, are insufficient, and add no substance to the complaint [*Hoffman* v. *Halden,* 268 F.2d 280 (9th Cir. 1959)].

The Facts

The facts, as revealed by the complaint, the affidavit of the individual plaintiff and the filed papers, are set forth forth in detail and with great care in the opinion of the District Court (A29-34). These facts are the facts as asserted by the plaintiffs themselves and are given the liberal construction mandated by the principles underlying notice pleading.

The Claimed Issue

The defendant-appellee Sideman's position from the outset has been that the complaint sets forth no claim for relief and there is no contested issue of material fact. The appellants claim that the issue on this appeal is as follows:

> "The sole issue in this case is whether there is not a question of fact in this action as to whether, when appellee Edith Sideman and the other defendant residents persuaded the defendant public officials to institute and prosecute proceedings against the individual appellant . . . and when appellee Sideman actively participated in one of those proceedings, she had knowledge that they were in violation of law." (B-2)*

Interpolated in the appellants' statement of the "sole issue" herein is the unsupported and erroneous conclusion,

---

* B followed by Arabic numbers are references to pages of the Appellants' Brief.

namely, "appellee Sideman actively participated in one of those proceedings." Presumably, the appellants refer to the unsupported allegation that "whenever Sideman determined that there was unnecessary noise emanating from appellants' discotheque, she would call the Village Police Department, and a police official would visit the discotheque and present the individual appellant with a summons" (B-9-10). It is respectfully submitted that the quoted charge, even if true, fails to demonstrate that the defendant Sideman "participated" in any proceeding against the appellants. Even a cursory examination of the nature of the proceedings instituted against the plaintiffs reveals that they could only be brought by public officials charged by law with these functions, and that a private citizen had no power, jointly with public officials or otherwise, to institute or maintain such proceedings.

It is important to note that separate and apart from the complaints to the local police just mentioned, the plaintiffs nowhere allege an overt act on the part of the defendant Sideman other than that she "joined with some of her fellow residents to persuade certain public officials" (B-5); "persuaded the landlord of the A & P Supermarket" (B-6); "was among those who signed a petition" (B-7); "and caused the individual appellant's application for a change of venue to be opposed by the Village authorities" (B-10). As noted below, the plaintiffs thus complain of the exercise of the defendant Sideman's First Amendment rights, and nothing more. On the other hand, the plaintiffs have failed completely to demonstrate the deprivation of any of the plaintiffs' rights secured by the Constitution and laws of the United States, by Sideman, and that such deprivation took place under color of law. The plaintiffs thus have failed to state a claim under § 1983 or under § 1985 of the United States Code [*Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1970; *Jackson* v. *Hepinstall*, 328 F. Supp. 1104 (N.D.N.Y. 1971).

Not only have the plaintiffs failed to state a claim under the civil rights statutes, the plaintiffs have failed to allege any unlawful conduct whatsoever on the part of the defendant Sideman, although they now claim, as indicated above, that when Sideman persuaded the defendant public officials to institute and prosecute proceedings against the individual plaintiff-appellant, she had knowledge that these proceedings were in violation of law.

The strong presumption of the constitutionality of any legislative enactment, including a municipal ordinance, is to be indulged. The plaintiffs herein had the burden of overcoming the presumption of constitutionality by some evidentiary showing that the subject ordinances were unconstitutional, as applied to them [*Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 82 S. Ct. 987 (1962); *Oriental Boulevard Co.* v. *Heller,* 27 N.Y.2d 212, 219, 316 N.Y.S.2d 226, 230; App. dismissed 401 U.S. 986, 91 S. Ct. 1234 (1971)].

The plaintiffs have done less than nothing to meet their burden. The record herein bears out the validity of the presumption in the instant case and demonstrates that the paintiffs had several opportunities in the State Court proceedings against them to raise the issue. They either did not do so or the contention was overruled. Thus, the individual plaintiff confesses he was convicted and fined under the "cabaret" ordinance (A-23) and was convicted under several summonses issued under the "unnecessary noise" ordinance (A-24). Implicit in these convictions is a judicial finding of constitutionality and validity of the subject ordinances. On the other hand, the record reveals no definitive determination of unconstitutionality of either of these local laws. Consequently, there is no extant knowledge of the unconstitutionality of these legislative enactments, and consequently, the defendant Sideman cannot validly be charged with possessing such knowledge. The single purported issue posed by the appellants, quoted above, is sham and nonexistent.

Argument

The conduct of the defendant Sideman of which the plaintiffs complain was simply and solely the exercise of her First Amendment rights, which our Courts have consistently recognized as fundamental and absolutely essential to our democratic society. Sideman exercised such rights as an individual citizen and a concerned resident of the community, and did not act under any color of law or in any conspiracy. In persuading local officials to take action to preserve her domestic tranquility and in petitioning the local authorities to redress her grievances, Sideman was engaged in constitutionally protected activities. We pass over the question whether such constitutionally protected activities may be overt acts in furtherance of an unlawful conspiracy. In any event, the record herein is barren of any facts to support a conspiracy charge (Cf. *Hoffman* v. *Halden, supra*). Assuming *arguendo* such a conspiracy existed, no damage flowed to the plaintiffs from any overt acts thereunder, for the plaintiffs themselves have revealed that the discotheque became unprofitable not because of the defendants' activities, but because the discotheque in its location could not operate successfully under the hours prescribed by the "cabaret" ordinance (A-24).

The plaintiffs have set forth no valid claim for relief and no material issue of fact to be tried. Summary judgment is an integral part of the protection afforded First Amendment rights [*F & J Enterprises, Inc.* v. *Columbia Broadcasting,* 373 F. Supp. 292 (N.D. Ohio 1974); Cf. *Cerrito* v. *Time, Inc.,* 302 F. Supp. 1071, 1075-6 (N.D. Cal. 1969), aff'd *per curiam,* 449 F.2d 306; *Henley* v. *Wise,* 303 F. Supp. 62, 65 (N.D. Ind. 1969)].

The instant action is a retaliatory measure designed to have, and does have, a genuine chilling effect on the defendant Sideman's First Amendment rights. The pendency

of the case created a financial burden for Sideman and its protracted existence would have expanded Sideman's financial burden accordingly. The District Court's finding that there was no just cause for delay, pursuant to Rule 54(b), and that a final judgment should be filed, was preeminently sound and justified under the circumstances [See *Dombrowski* v. *Pfister,* 380 U.S. 487, 85 S. Ct. 1116 (1965)].

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

ZIMMER, FISHBACH & HERTAN
Attorneys for Defendant-Appellee
Edith Sideman

LOUIS C. FIELAND
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs-Appellants,

against

EDITH SIDEMAN, "JOHN DOE", RICHARD ROE" and "THOMAS HOE",

Defendants-Appellees,

and

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C., MUSTICH, LOUIS LIFRIERI, THOMAS FORTE and MICHAEL ROTH,

Defendants.

AFFIDAVIT OF SERVICE

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT FOURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, New York.
That on February 18, 1976, he served 2 copies of Brief of Defendant-Appellee
on

BUTLER JABLOW & GELLER, ESQS.,
Attorneys for Plaintiffs-Appellants
400 Madison Avenue
New York, New York.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan Delgado

Sworn to before me this
18th day of February, 19 76

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932950
Qualified in Nassau County
Commission Expires March 30, 19 76